Supreme Court, U.S.
FILED
MAR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1336

in the

Supreme Court

of the

United States

October Term, 1985

FREDERICK J. WALSH, CHIEF OF POLICE
OF ORLANDO, FLORIDA

Petitioner,

vs.

CENTRAL FLORIDA NUCLEAR FREEZE
CAMPAIGN AND BRUCE GAGNON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

MAY A CITY, AS A PREREQUISITE TO ISSUING A PERMIT FOR THE USE OF A PUBLIC FORUM BY PERSONS ENGAGED IN PROTECTED FIRST AMENDMENT ACTIVITIES, CHARGE THE USERS THE FULL COST OF THE POLICE SERVICES THE CITY DEEMS NECESSARY FOR TRAFFIC AND CROWD CONTROL, INCLUDING THE COSTS ASSOCIATED WITH PROTECTING THE SPEAKERS FROM HOSTILE ATTACKS BY DISAGREEING OBSERVERS?

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STATEMENT OF THE CASE

This case is not complicated. The City of Orlando, Florida, pursuant to a local ordinance, conditioned the exercise of First Amendment rights upon payment of the projected cost of providing police services for a planned anti-nuclear parade and rally. The District Court upheld the validity of the ordinance in a brief, unreported order, citing *Cox v. New Hampshire*, 312 U.S. 569 (1941). (Pet. App. B-86a).

The Court of Appeals for the Eleventh Circuit reversed, concluding that requiring pre-payment for police services as a condition to exercising First Amendment rights was "unconstitutional on its face and as applied." *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515,1526 (11h Cir.1985) (Pet.App. A-62a).

The undisputed facts of the case established that in determining the level of required police protection, "[t]he city based its decision on a number of factors including its belief that due to the controversial nature of the rally and the location of the Martin Marietta plant, a major defense manufacturer and a large local employer in Orlando, the potential for hostile counter activity existed which necessitated the need for additional police protection." (Pet. App. A-12a-13a).

The Court of Appeals held, *inter alia*:

> Moreover, to the extent that the fees charged to the Central Florida Nuclear Freeze Campaign were based upon the content of the

demonstrator's views, the City of Orlando charged the organizers of the march and rally for the enjoyment of a right guaranteed by the Federal Constitution.

* * *

The deputy chief of police, Frederick Walsh, testified in his deposition that the Nuclear Freeze Campaign permit costs included subjective considerations of police protection from hostile counter activity and the presence of out-of-town demonstrators.

* * *

The effect of the Orlando ordinance, as applied in the case at hand, is to charge more for First Amendment activity which may require more police protection than less controversial speech; such a result places an undue burden on speech which is constitutionally unacceptable.

(Pet. App. A-49a; 52a-53a; 55a).

Thus, contrary to the Petitioner's broadly stated view of this case as an example of unresolved tensions between the First Amendment and local government financing, the decision below also presents a much narrower *ratio decidendi* which counsels against certiorari.

SUMMARY OF ARGUMENT

The decision below does not present an important unanswered question, nor does it conflict with any decisions of this Court.

One basis for the decision was that the charges imposed for police services required payment to protect the Petitioners from hostile counter activity. A long line of cases condemns limiting First Amendment rights because of the threat of hostile demonstrators. Since "this Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ", *Kremens v. Bartley*, 431 U.S. 119,136 (1977), quoting *Liverpool, N.Y. & P.S.S. Co. v. Emmigration Comm'rs*, 113 U.S. 33,39 (1885), and since on this record a basis for the decision below is in complete accord with established constitutional principles, the Petitioner's suggestion that certiorari be granted to revisit *Cox v. New Hampshire*, 312 U.S. 569 (1941), should be declined.

THE REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The Petitioner's strongest contention is that since the 1941 Cox decision "there has been no clarification from this Court on the issue of fees for police services." Pet. at 21.

If this case squarely presented the need to evaluate *Cox* in light of later First Amendment law, opposing certiorari would be difficult.

But the decision below also presents a much narrower constitutional basis for its decision: the impropriety of forcing demonstrators to pay to be protected from hostile counter activity. That constitutional holding is neither new nor novel. Since "this Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied' ", *Kremens v. Bartley*, 431 U.S. 119,136 (1977), quoting *Liverpool, N.Y. & P.S.S. Co. v. Emmigration Comm'rs*, 113 U.S. 33,39 (1885), the decisional law which determines the outcome of this case compels the conclusion that the opinion below does not conflict with the holdings of this Court, nor does it present any important, unanswered question meriting certiorari review.

Numerous cases protect the exercise of First Amendment rights from "hecklers' vetoes." The cases have helpfully been collected by Professor Neisser in *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo.L.J. 257, 288 n.166 (1986):

> *See*, Coates v. Cincinnati, 402 U.S. 611 615-16 (1971) (state may not punish citizens for engaging in public gathering "annoying" to others); Bachellar v. Maryland, 397 U.S. 564, 567 (1970) (state cannot punish Vietnam protestors because of "resentment" of onlookers); Gregory v. City of Chicago, 394 U.S. 111, 117 (1969) (disorderly conduct conviction cannot stand when defendant acted in "orderly manner in public protest" but surrounding crowd became hostile), Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) (plurality opinion) ("participants in an orderly

demonstration in a public place are not chargeable with danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence"); Cox v. Louisiana, 379 U.S. 536, 550 (1965) (reversing breach of peace conviction where 1500 demonstrators separated by 75 to 80 police from 100 to 300 "muttering" spectators); Watson v. City of Memphis, 373 U.S. 526, 635 (1963) (reversing order granting city six months to develop desegregation plan for city parks where basis for delay was potential violence); Wright v. Georgia, 373 U.S. 284, 292-93 (1963) (reversing breach of peace convictions of blacks playing basketball in whites-only park on due process grounds, in part because conviction based on likelihood of breach of peace by others); Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (reversing breach of peace conviction of 200 peaceful demonstrators at State House where onlookers had become unruly and threatened disruption). . . .

The Petitioner's deposition testimony, quoted by the Court of Appeals, reveals the economic "heckler's veto" imposed here:

Q. The question I have is why must the demonstrators pay for protection of the rights that it is your job to guarantee?

A. It has been our position on that issue that were it not for this particular

> demonstration, then the cost—the cost factor, which it boils down to an amount of dollars here, that the City would have expended would no longer be necessary. In other words, if the exercise—if the 18A permit were not granted and whatever happens there with that 18A permit didn't happen, then there would be no potential for a violation of rights or for disorder or anything else, you see. So the reason that the potential exists is because of the events that is happening. So the question then becomes one of should the taxpayer out of the tax base, the general fund which subsidizes police service to perform a certain function here in city be—absorb that or should it be absorbed by the people that are actually in the process of exercising their rights.
>
> (Pet. App. A-82a-83a).

In *Hague v. CIO*, 307 U.S. 496 (1939), the Court condemned an ordinance allowing First Amendment rights to be denied in order to prevent "riots, disturbances or disorderly assemblage", because such ordinances can

> . . . be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the

duty to maintain order in connection with the exercise of the right.

Id., at 516.

The Respondents were exercising clearly protected constitutional rights. By charging for police services based upon anticipated "hostile counter activity", the Petitioner charged them "for the enjoyment of a right granted by the Federal Constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). No case stands for the proposition that demonstrators must pay the police to protect their First Amendment rights from mob violence. Indeed, the cases all counsel the opposite result.[1]

Cox v. New Hampshire need not be reviewed upon the facts of this case. The Petitioner's claim that "the lower courts are sorely in need of this Court's guidance [regarding the continued viability of Cox]", Pet. at 21, is unfounded. The Petitioner supports his claim with a single unreported "directly on point" case, *Stonewall Union v. City of Columbus*, (U.S.D.C. E.D. Ohio, 1985), which is reproduced in the Appendix (Pet. App. F-136a). The District Court in *Stonewall* found: "on the present state of the record, there has been no showing that the assessment of costs for traffic control is in any way content based or that it is applied in a discriminatory manner. . . ." (Pet. App. F-160a.)

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[1]By assessing provocativeness and charging for it, the City also contravened the principle that government may not restrain speech on the basis of its content. *See, City of Renton v. Playtime Theatres, Inc.* ____ U.S. ____, 54 L.W. 4160, 4161-62 (February 25, 1986).

The Court of Appeals in this case found the record supportive of content discrimination. (Pet. App. A-43a.) Perhaps *Stonewall*, which is apparently in the Sixth Circuit (Pet. at 22), will present important unanswered and unavoidable questions about *Cox*. This case does not do so. Therefore certiorari should not be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true copies of the foregoing "Brief in Opposition to Certiorari" have been furnished by U.S.Mail to JODY M. LITCHFORD, Assistant City Attorney, P. O. Box 913, Orlando, Florida 32802, pursuant to Rule 28.3 of this Court, this _____ day of March, 1986.

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BRUCE ROGOW